Energy Automation Systems, Inc. v. Xcentric Ventures, LLC et al Doc. 25

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ENERGY AUTOMATION SYSTEMS, INC.,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION NO. 3-06-1079**
XCENTRIC VENTURES, LLC, d/b/a BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP-OFF REPORT and/or RIPOFFREPORT.COM, and EDWARD MAGEDSON a/k/a ED MAGEDSON,	)	**Judge Aleta Trauger** **Magistrate Judge Juliet Griffin** **JURY DEMAND**
Defendants.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Plaintiff Energy Automation Systems, Inc. ("EASI") opposes defendant Xcentric Ventures, LLC's ("Xcentric") motion to dismiss for lack of personal jurisdiction. (Doc. No. 17.) For the reasons stated below, the Court should deny Xcentric's motion.

I. INTRODUCTION

Xcentric's motion resurrects arguments already rejected by numerous courts across this country in suits against ripoffreport.com (the "website"). The failure of Xcentric to address the substantial body of case law generated by its tortious conduct is telling but not surprising as courts, almost without exception, have held that (1) courts have personal jurisdiction over the operators of the website and (2) the Communications Decency Act, 47 U.S.C. § 230 (the "CDA"), does not immunize the operators' tortious behavior.

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This Court has personal jurisdiction over Xcentric based upon its significant contacts with Tennessee, including:

- Editing and publishing over two thousand complaints – so called "Rip-off Reports" – directed at Tennessee companies and individuals, including over twenty concerning EASI, a Tennessee company;
- Actively soliciting, encouraging and receiving "reports" from Tennesseans, who purportedly wrote some "reports" about EASI;
- Creating and developing original content on the website concerning EASI;
- Offering for sale to EASI the so-called "Rip-off Report Corporate Advocacy Business Remediation & Customer Satisfaction Program";
- Communicating directly with at least two Tennessee residents about EASI;
- Offering visitors the ability to search for "reports" by company, including EASI; and
- Causing EASI injuries in Tennessee through lost EASI dealership sales.

Likewise, the website is commercial and interactive, not passive, in that Xcentric has engaged in the following behavior:

- Soliciting and receiving donations;
- Advertising, promoting and offering to sell a book called the "Rip-off Revenge Guide";
- Offering individuals the prospect of compensation for submitting reports;
- Recommending tactics for complainants to follow in crafting reports;
- Helping organize lawsuits, including class action litigation;
- Assisting complainants in obtaining media attention; and
- Selling advertising space on the website.

According to Xcentric, because the CDA immunizes its behavior, Xcentric cannot be said to have directed tortious conduct at EASI and, thus, this Court lacks personal jurisdiction over Xcentric. Xcentric further states that the Amended Complaint does not allege that Xcentric wrote defamatory content regarding EASI. These arguments go to the sufficiency of the claims (Rule 12(b)(6)), not to Xcentric's amenability to suit in Tennessee (Rule 12(b)(2)) and, therefore, are inappropriate on this motion.

Moreover, as other courts have repeatedly held in similar cases, the CDA does not immunize Xcentric's tortious conduct because Xcentric creates and develops original content on its website targeting EASI – as the Amended Complaint expressly alleges. EASI requests oral argument.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Bad Business Bureau, operated by Defendants, holds itself out as a full-service consumer advocacy resource center for victims of bad businesses. The centerpiece of the operation is its website located through either of two domain names: ripoffreport.com or badbusinessbureau.com.

The very Internet web addresses imply that a company has "ripped off" consumers. Above every entry denouncing companies, including EASI, is the moniker "**Don't let them get away with it. Make sure they make the Rip-off Report!**" (E.g., Doc. No. 19 at 2.)

Defendants' business model is three-fold. First, Defendants encourage third parties to make unsupported and salacious accusations about companies to generate interest in the website. For example, in an email exchange discussed in greater detail below, Defendant Ed Magedson, the founder and "manager" of the website (Declaration of Edward Magedson dated March 26, 2007 ("Magedson Decl.") ¶ 1), asked an individual to post "detailed" information to "p**s off" EASI. (Emails between Ed Magedson and Jeff LeJune attached as Exhibit A (third-party email redacted).)

The second phase of Defendants' business plan is to use these unsupported accusations as leverage to extort payments from targets seeking to clear their name. For instance, EASI Chief Executive Officer Joseph Merlo ("Merlo") contacted Magedson via email and informed him of the presence of numerous false and misleading statements on the website regarding EASI. (Emails between Magedson and Merlo attached as Exhibit B.) Merlo offered to prove the falsity of many of the statements with sworn testimony of the person who admitted to submitting multiple messages to Defendants under numerous names and asked that the statements be removed from the website. (Id.) Madgeson refused and instead demanded payment for remedying the falsities pursuant to the "Rip-off Corporate Advocacy Business Remediation & Customer Satisfaction Program." (Id.)[1]

Third, Defendants supplement their income through a range of product offerings and services. According to the website, they solicit donations, advertise and sell the "Rip-off Revenge Guide" for $21.95, organize lawsuits,[2] and assist complainants in seeking media attention. (Rip-off Report.com, Home Page, at http://www.ripoffreport.com/default.asp (last visited April 7, 2007) ("Home Page").)[3]

EASI initiated this litigation following unsuccessful and repeated efforts to remedy the false and misleading content on the website. EASI has served Xcentric, but Magedson to date has successfully avoided service. EASI filed an Amended Complaint on March 5, 2007. Xcentric filed a motion to dismiss for lack of personal jurisdiction three weeks later.

III. STANDARD OF REVIEW

In adjudicating a Rule 12(b)(2) motion, a district court has three procedural alternatives: (1) "it may decide the motion upon the affidavits alone;" (2) "it may permit discovery in aid of deciding the motion;" or (3) "it may conduct an evidentiary hearing to resolve any apparent factual questions." Theunissen v. Matthews, 935 F.2d 1454, 1458 (6th Cir. 1991). "[T]he method selected affects the burden of proof the plaintiff must bear to avoid dismissal." Id.

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[1] One court found for purposes of a Rule 12(b)(6) motion that Xcentric and Magedson sought $50,000 plus a monthly retainer of $1,500 to remedy false statements against a Wisconsin company. Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1146 (D. Ariz. 2005).

[2] Defendants proposed to refer clients to a particular law firm and attempted to negotiate a fee of $800,000 per year for this service. George S. May Int'l Co. v. Xcentric Ventures, LLC, 409 F. Supp. 2d 1052, 1059 (N.D. Ill. 2006).

[3] A court may take judicial notice of the contents of an Internet website. City of Monroe Emples. Ret. Sys. v. Bridgestone Corp., 387 F.3d 468, 472 n.1 (6th Cir. 2004); United States ex rel. Fry v. Guidant Corp., 3:03-0842, 2006 U.S. Dist. LEXIS 65702, at **28-30 (M.D. Tenn. Sept. 13, 2006) (Trauger, J.) (discussing with approval Seventh Circuit case) (copy attached).

On November 6, 2006, the Court stayed discovery until the case management conference. Xcentric's motion is supported by a declaration and numerous affidavits alleging facts about which EASI has not had the opportunity to take discovery. (Doc. No. 4.) On April 3, 2007, EASI's counsel asked Xcentric's counsel whether they would agree to EASI conducting limited discovery on the jurisdictional issue. Xcentric refused to agree on April 10, 2007. On April 11, 2007, EASI moved to lift the stay for the limited purpose of allowing EASI to discover jurisdictional facts.

In refusing to agree to discovery on the jurisdictional issue, Xcentric has, in effect, asked the Court to apply the first method of review, wherein EASI bears the "relatively slight" burden of making "only a *prima facie* showing that personal jurisdiction exists in order to defeat dismissal." Am. Greetings Corp. v. Cohn, 839 F.2d 1164, 1169 (6th Cir. 1988); Theunissen, 935 F.2d at 1458-59. "In such an instance, not only will the [plaintiff's] pleadings and affidavits be considered in the light most favorable to the plaintiff, but ***the court will not consider or weigh the controverting assertions of the defendant***." Kelly v. Int'l Capital Res., Inc., 231 F.R.D. 502, 509 (M.D. Tenn. Nov. 9, 2005) (Trauger, J.) (emphasis added).

It would be unfair for the Court to proceed under either the second or third method and, thus, hold EASI to a higher standard of proof that only applies in cases where discovery has taken place. Therefore, if the Court is unable to decide the motion to dismiss in EASI's favor at this stage in the litigation, the Court should stay its ruling on the motion to dismiss, and allow EASI to conduct discovery on this issue.

IV. ARGUMENT

A. This Court Has Specific Personal Jurisdiction Over Xcentric.

A court has specific personal jurisdiction over a defendant if (1) the court has jurisdiction under the long-arm statute of the forum state and (2) the exercise of personal jurisdiction would not offend the Due Process Clause of the Fourteenth Amendment. See Bird v. Parsons, 289 F.3d 865, 871 (6th Cir. 2002). Both requirements are satisfied.

Courts almost without exception have exercised specific personal jurisdiction over the operators of ripoffreport.com. See George S. May, Int'l Co., 409 F. Supp. 2d at 1059; Whitney Info. Network, Inc., 347 F. Supp. 2d at 1246; Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, No. 2:04-CV-47-FTM-UA-SPC, Doc. No. 82 at 8 (M.D. Fla. Feb. 23, 2007); cf. MCW, Inc. v. Badbusinessbureau.com, LLC, No. 3:02-CV-2727-G, 2004 U.S. Dist LEXIS 6678, at **17-18 (N.D. Tex. Apr. 19 2004) (copy attached). The only case of which EASI is aware that reached a contrary result expressly rejected the governing case law of the Sixth Circuit and its "sliding scale" approach to specific personal jurisdiction discussed below. See Hy Cite Corp v. Badbusinessbureau.com.LLC, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004) ("I am reluctant to fall in line with these courts [including the Sixth Circuit] . . . .").

1. This Court has jurisdiction under Tennessee's long-arm statute.

The Tennessee long-arm statute sets the Constitutional "minimum contacts" test as the minimum requirement for exercising jurisdiction over an out-of-state defendant. Tenn. Code Ann. § 20-2-214(a)(6).

One event which may subject a nonresident to the jurisdiction of Tennessee courts is "[a]ny tortious act or omission within this state." Tenn. Code Ann. § 20-2-214(a)(2). EASI's Amended Complaint alleges the following tortious acts of Xcentric in Tennessee: defamation

(Count I), violation of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 et seq. (Count II), interference with business relations (Count III), and civil conspiracy (Count IV).

Xcentric presents a two-fold attack on the merits of EASI's claim. First, Xcentric denies liability, stating that it did not direct tortious conduct at EASI because the Communications Decency Act protects Xcentric from liability. (Doc. No. 17 at 13.) Xcentric does not deny many of the actions; it claims that its conduct is not actionable. Second, Xcentric argues that the Amended Complaint does not allege that Xcentric authored any of the defamatory content at issue. (Doc. No. 17 at 9.) These arguments go to the sufficiency of the claims and, as such, are inapposite to a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2):

> It is easy to see that Rule 12(b)(2) (personal jurisdiction) and Rule 12(b)(6) (failure to state a claim) inquiries are separate and distinct . . . A non-resident's amenability to suit here in no way turns on the viability of the claim the plaintiff asserts. Conversely, that the plaintiff's claim is without merit is never sufficient to establish lack of personal jurisdiction. The non-resident does not prevail on his Rule 12(b)(2) motion by convincing the court that the plaintiff's suit is groundless . . . [I]n our present procedural posture, we take as viable the substantive legal premises of the complaint.

Petters v. Petters, 560 So. 2d 722, 724-25 (Miss. 1990) (citations omitted).[4]

Xcentric's arguments are suited for a motion to dismiss for failure to state a claim or a motion for summary judgment, not for the present motion to dismiss for lack of personal jurisdiction. Indeed, courts have held that the operators of ripoffreport.com are within the long-arm statutes of various states. George S. May Int'l Co. v. Xcentric Ventures, LLC, 409 F. Supp. 2d 1052, 1059 (N.D. Ill. 2006); Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, 347 F. Supp. 2d 1242, 1245 (M.D. Fla. 2004).

Moreover, the Eleventh Circuit recently considered Defendants' novel interpretation of the Federal Rules, held that the long-arm statute reached the Defendants and remanded for a determination of whether the exercise of personal jurisdiction would offend due process. Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, No. 06-11888, 2006 U.S. App. LEXIS 19518, at **18-19 (11th Cir. Aug. 1, 2006) (copy attached). After remand, the district court held that the exercise of personal jurisdiction did not violate due process. Whitney Info. Network, Inc. v. Xcentric Ventures, LLC, No. 2:04-CV-47-FTM-UA-SPC, Doc. No. 82 at 8 (M.D. Fla. Feb. 23, 2007) (copy attached).

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[4] Rules 12(b)(2) and 12(b)(6) of the Mississippi Rules of Civil Procedure are substantively identical to their federal counterparts.

2. The Exercise of Jurisdiction Comports with Due Process

The only remaining question is whether the exercise of jurisdiction comports with "the limits . . . imposed by the Due Process Clause." Bridgeport Music, Inc. v. Agarita Music, Inc., 182 F. Supp. 2d 653, 658 (M.D. Tenn. 2002) (citation omitted).

The Sixth Circuit has established a three part "minimum contacts" test to determine whether specific jurisdiction is proper: (1) the defendant must purposefully avail itself of the privilege of acting in the forum state or causing a consequence in the forum state, (2) the cause of action must arise from the defendant's activities there, and (3) the acts of defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable. See Bird v. Parsons, 289 F.3d 865, 874 (6th Cir. 2002).

A) Xcentric has purposefully availed itself of the privilege of conducting activities within Tennessee

"[E]ven a single purposeful contact may be sufficient to meet the minimum contacts standard when the underlying proceeding is directly related to that contact." SEC v. Knowles, 87 F.3d 413, 419 (10th Cir. 1996) (emphasis added).

Xcentric has purposefully conducted numerous activities within Tennessee. Courts have repeatedly held that Xcentric's activities satisfy this requirement. See George S. May Int'l Co., 409 F. Supp. 2d at 1059; Whitney Info. Network, Inc., 347 F. Supp. 2d at 1246; Whitney Info. Network, Inc., No. 2:04-CV-47-FTM-UA-SPC, Doc. No. 82 at 7.

i) Xcentric's website targets EASI.

The website specifically targets EASI in various ways. First, Xcentric has edited and posted, by Magedson's count, twenty-two "reports" targeting EASI (Magedson Decl. ¶ 13). In fact, Magedson admits that Xcentric's editors review each report prior to posting. (Id. ¶ 11.)

Postings specifically target Tennessee residents (e.g., EASI CEO Joseph Merlo) and a Tennessee corporation (EASI) and concern a Tennessee community (Hendersonville, Tennessee). (See, e.g., Doc. No. 19 at 8-9 (quoted above).) Moreover, the reports targeting EASI list Hendersonville, Tennessee, as EASI's place of business, and a typical heading references that city. (E.g., Doc. No. 19 at 2, 5.)

Second, the website allows users to search by Tennessee companies, including EASI. (Doc. No. 19 at 2.)

Third, Defendants have created and developed original content directed at EASI. See Hibdon v. Grabowski, 195 S.W.3d 48, 53 (Tenn. Ct. App. 2005) (specific personal jurisdiction proper where defendants "personally directed many of their Internet messages to residents of Tennessee"). In Xcentric's second proposed motion threatening Rule 11 sanctions, Xcentric admitted that Magedson authored an entry concerning EASI:

> There is one entry from the editor of Rip-off Report, "we know that this response did not come from the original author."

([Unsigned] Motion for Rule 11 Sanctions at 8, attached to letter from David S. Gingras to John R. Jacobson dated March 12, 2007, attached hereto as Exhibit C.) Other contributions of Defendants are discussed below in the context of CDA immunity.

Fourth, the website has caused harm to EASI in Tennessee through lost dealership sales, which individually sell for about $40,000. (Amend. Compl. ¶ 23.) Income from the sale of EASI dealerships comes to EASI's office in Hendersonville, Tennessee, and most of EASI's assets are located in Tennessee. (Declaration of Paul B. Bleiweis ("Bleiweis Decl.") at ¶ 3.)

Based largely on these factors, a Florida district court held that Defendants' activities were "purposefully directed" at the state of Florida. Whitney Info. Network, Inc., 347 F. Supp. 2d at 1246.

ii) Xcentric operates a commercial and interactive website in this jurisdictional district

"The operation of an Internet website can constitute the purposeful availment of the privilege of acting in a forum state . . . if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." Bird v. Parsons, 289 F. 3d 865, 874 (6th Cir. 2002).

Courts in the Sixth Circuit review the interactivity of a website by applying a "sliding scale":

> At one end of the spectrum are situations where a defendant clearly does business over the Internet . . . At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer.

E.g., First Tenn. Nat'l Corp. v. Horizon Nat'l Bank, 225 F. Supp. 2d 816, 820 (W.D. Tenn. 2002).

Xcentric's website is "a far cry from passive websites." George S. May Int'l Co., 409 F. Supp. 2d at 1059. First, Xcentric solicits donations for the "high cost" of pursing the "bad guys." (Rip-off Report.com, Donations, at http://www.ripoffreport.com/donations.asp (last visited April 7, 2007).) Second, the website helps organize lawsuits, including class-action litigation. (Home

Page.) Third, the website offers to assist complainants obtain media attention. (Id.) Fourth, Xcentric offers the prospect of compensation for submitting certain reports and also recommends tactics for use in digging up information on companies. (Rip-off Report.com, Rip-off Report Reporters, at http://www.ripoffreport.com/reporter.asp (last visited April 5, 2007).) Fifth, the website sells advertising space. (Home Page.)

Sixth, the website advertises, promotes and offers to sell the "Rip-off Revenge Guide." Magedson's Declaration, however, states that the product belongs to a different entity than Xcentric. (Magedson Decl. ¶ 21.) It is unclear how long this has been the case. See Whitney Info. Network, Inc., 347 F. Supp. 2d at 1246 ("[T]he defendants sell products to assist consumers in prevailing in their disputes with companies."). Regardless, Defendants' website offers these products for sale, including through a "pop-up" advertisement stating that this Guide is "From the founder of Rip-Off Report.com" and through a conspicuous link to purchase the product located on the front page of ripoffreport.com. (Rip-off Report.com, Revenge Guide, at http://www.ripoffreport.com/revengead.htm (last visited April 5, 2007)); (Home Page.)

Based on many of these factors, an Illinois district court held that this very website is sufficiently commercial and interactive for its exercise of personal jurisdiction. George S. May Int'l Co., 409 F. Supp. 2d at 1059; see also Bird v. Parsons, 289 F. 3d 865, 874-75 (6th Cir. 2002) (holding that a website was sufficiently interactive under Zippo to constitute purposeful availment).

iii) Defendants have communicated with Tennessee residents regarding EASI

Communications with residents of the forum state can support a finding of purposeful availment. Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996) (email and regular mail); Rae v. Meier, No. 02-2329, 2003 U.S. Dist. LEXIS 2365, at *10 (W.D. Tenn. Feb. 19, 2003) (telephone and email) (copy attached).

Defendants have repeatedly and directly communicated with at least two Tennessee residents regarding EASI. First, Defendants spoke by telephone with and sent no fewer than four emails to Dr. Paul B. Bleiweis, EASI's President. (Bleiweis Decl. ¶ 2; emails between Ed Magedson and Dr. Paul B. Bleiweis attached as Exhibit D.) Dr. Bleiweis' emails to Magedson contained an address clearly indicating that Bleiweis and EASI were located in Hendersonville, Tennessee. (Id.)

Second, Magedson and/or his staff wrote no fewer than five emails to EASI CEO's Merlo. (Emails between Ed Magedson and Joseph Merlo attached as Exhibit B.) Again, Merlo's emails to Magedson contained an address clearly indicating that Merlo and EASI were located in Hendersonville, Tennessee. (Id.)

B) EASI's causes of action arose from Defendants' activities in Tennessee.

The second part of the "minimum contacts" test is also satisfied. The specific jurisdiction requirement that the cause of action must have arisen from Defendants' activities in the forum state need not be met by a cause of action "that formally arises from the defendant's contacts," but may be satisfied by a cause of action that merely has a "substantial connection" with the defendant's in-state activities. Inter-City Prods., 149 F.R.D. at 573 (citation omitted).

In this case, EASI's claims are based on Defendants' activities in operating the website and in offering related services. As discussed above, EASI seeks damages based on Defendants' active creation and development of false and deceptively misleading content on the website concerning EASI. EASI's claims also arise from Defendants' extortion operation offered for sale in the guise of the "Corporate Advocacy Program."

Indeed, at least two courts have held that this requirement was satisfied in other cases involving ripoffreport.com. George S. May Int'l Co., 409 F. Supp. 2d at 1060; Whitney Info. Network, Inc., 347 F. Supp. 2d at 1246. This Court should do the same.

C) The exercise of jurisdiction over Xcentric is reasonable in this case.

Once the first two criteria of the analysis are satisfied, "an inference of reasonableness arises which satisfies the third criterion absent a showing of unusual circumstances." Inter-City Prods., 149 F.R.D. at 573; Tobin, 993 F. 2d at 544. Because EASI has established the first two criteria, the Court should find that the third element is established.

The determination of reasonableness depends on an evaluation of several factors: "the burden on [Xcentric] of litigation in this forum, the interest of [Tennessee], [EASI's] interest in obtaining convenient and effective relief, and the shared interest of the several states in furthering fundamental substantive social policies." Tobin, 993 F.2d at 545.

Any burden on Xcentric is mitigated by Xcentric's substantial contacts with Tennessee discussed above. Moreover, the operators of the website are accustomed to defending suits across the country[5] and, by their own admission, "Xcentric has developed a detailed litigation strategy of its own for resolving such matters swiftly and decisively." (Letter from David S. Gingras to John R. Jacobson dated March 12, 2007 at 3, attached as Exhibit C.) Like other states, Tennessee has an interest in protecting its residents from harmful false and defamatory statements. EASI has a strong interest in obtaining convenient and effective relief – the website targeted EASI in Tennessee. In short, the exercise of jurisdiction is reasonable in this case.

[5] The operators of the website have defended litigation in numerous jurisdictions, including New York, Illinois, Wisconsin, Arizona and Florida.

3. No forum selection clause binds EASI.

Xcentric cites a purported forum selection clause that would mandate the state of Arizona's exclusive jurisdiction over this case. (Doc. No. 17 at 10.) According to Xcentric, a user must submit to Arizona's exclusive jurisdiction in order to post a Rip-off Report on the website. This purported agreement does not bind EASI because EASI was not a party to any such agreement, and such agreements are not enforceable against third-parties. See 16 James Wm. Moore, Moore's Federal Practice § 108.53[5][b][i] (3d. ed. 2006).

Moreover, no forum selection clause governs Defendants' development and creation of false and deceptively misleading content independent of third-party posters. In such cases, no forum selection clause was executed.

In addition, the forum selection clause is an unenforceable "take it or leave it" adhesion contract. See Buraczynski v. Eyring, 919 S.W.2d 314, 320 (Tenn. 1996).

In sum, this Court has specific jurisdiction over Xcentric, and the case should properly be heard in the Middle District of Tennessee.

B. This Court has General Personal Jurisdiction over Xcentric.

General jurisdiction is proper where "a defendant's contacts with the forum state are of such a 'continuous and systematic' nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state." Third Nat'l Bank v. Wedge Group, Inc., 882 F.2d 1087, 1089 (6th Cir. 1989).

Xcentric's contacts with Tennessee are continuous and systematic. Specifically, Xcentric has (1) edited and published over two thousand "Rip-off Reports" directed at Tennessee companies and individuals (Rip-off Report.com, Criteria: Tennessee in All Reports, at http://www.ripoffreport.com/results.asp?searchtype=1&q1=ALL&q3=&q2=Tennessee&submit2

=Search%21 (last visited April 5, 2007)); (2) actively solicited, encouraged and received "reports" from Tennesseans, who purportedly wrote some "reports" about Tennessee companies (e.g., Doc. No. 19 at 2-3.); (3) offered for sale in Tennessee the so-called "Rip-off Report Corporate Advocacy Business Remediation & Customer Satisfaction Program" (Exh. B); (4) communicated via telephone and email with at least two Tennessee residents about a Tennessee company (Exhs. B and D; Bleiweis Decl. at ¶ 2); (5) solicited and received donations (Rip-off Report.com, Donations, at http://www.ripoffreport.com/donations.asp (last visited April 7, 2007)); (6) offered individuals the prospect of compensation for submitting reports (Rip-off Report.com, Rip-off Report Reporters, at http://www.ripoffreport.com/reporter.asp (last visited April 5, 2007)); (7) recommended tactics for complainants to follow in crafting reports (id.); (8) advertised, promoted and offered to sell a book called the "Rip-off Revenge Guide" (Home Page); (9) offered to help organize lawsuits, including class action litigation (id.); (10) offered visitors the ability to search for "reports" by Tennessee (Rip-off Report.com, Search, at http://www.ripoffreport.com/search.asp (last visited April 7, 2007)); (11) offered to assist complainants in obtaining media attention (Home Page); (12) sold advertising space on the website (id.); and (13) created and developed original content regarding a Tennessee company (e.g., id.; Exhs. A and C; Doc. No. 19 at 2-3).

Applying several of the aforementioned factors, an Illinois district court exercised general jurisdiction over Defendants:

> As the court has indicated, Defendants in this case have sold books in Illinois, received donations from Illinois residents, and actively attempted to develop business relationships with Illinois law firms. The court determines that these activities represent "continuous and systematic" contacts with Illinois . . . The court therefore finds that the exercise of general jurisdiction over Defendants is proper in this case.

George S. May Int'l Co., 409 F. Supp. 2d at 1060 (internal citation omitted). This Court, therefore, also has general jurisdiction over Xcentric.

C. The CDA Does Not Immunize Xcentric's Tortious Conduct.

Though styled a motion to dismiss for lack of personal jurisdiction, the primary emphasis of Xcentric's motion is a two-part attack on the sufficiency of EASI's claims, not on Xcentric's contacts with Tennessee. This is not a 12(b)(6) motion, and the Court should not reach the merits of the claims in this procedural posture.

If the Court chooses to do so, however, Xcentric falls far short of satisfying its heavy burden under Rule 12(b)(6). A motion to dismiss under Rule 12(b)(6) is disfavored and rarely granted. Chilton Air Cooled Engines, Inc. v. Omark Indus., Inc., 721 F. Supp. 151, 153 (M.D. Tenn. 1988). "A motion to dismiss should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hughes v. Sanders, 469 F.3d 475, 477 (6th Cir. 2006) (internal quotation marks omitted).

1. The Amended Complaint alleges that Xcentric has developed or created defamatory content about EASI.

Xcentric asserts that EASI's Amended Complaint does not allege that Defendants wrote any of the challenged content. (Doc. No. 17 at 9.) This argument ignores the contents of the Amended Complaint:

> 26. Defendants have developed and/or created false statements on the Website about EASI, its dealerships and its employees . . . .
>
> 27. The substance of such statements includes that EASI is a corrupt company and a con artist, that EASI dealerships are a scam, that EASI's Chief Executive Officer and fellow employees are crooked and that EASI warrants inclusion in the Website's top Rip-off links.

(Amend. Compl. ¶¶ 26-27.) Moreover, Xcentric's argument disregards other allegations that Defendants created and/or developed content through, for example, actively encouraging at least one individual to post specific information and placing EASI on the website's "Top Rip-off Links." (E.g., Amend. Compl. ¶¶ 13-16.)

Moreover, Tennessee law does not require the defamed to plead the actual words of defamation; instead the substance of the statement is most significant. Handley v. May, 588 S.W.2d 772, 774-75 (Tenn. Ct. App. 1979).

2. Because Xcentric develops or creates defamatory content, the CDA does not immunize Xcentric's tortious behavior.

Xcentric's second challenge to the sufficiency of EASI's claims is that the CDA protects it from liability because third-parties, not Xcentric, wrote the defamatory material on the website concerning EASI. Courts have repeatedly rejected this argument and have held that the CDA does not shield the website's operators from the consequences of their tortious conduct. Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005); MCW, Inc. v. Badbusinessbureau.com, LLC, No. 3:02-CV-2727-G, 2004 U.S. Dist LEXIS 6678, at *35 (N.D. Tex. Apr. 19 2004); see also Optinrealbig.com, LLC v. Ironport Sys., Inc., 323 F. Supp. 2d 1037, 1045 (N. D. Cal. 2004).

As a general matter, the CDA grants internet-service providers immunity from liability for publishing false or defamatory material created solely by another party. See 47 U.S.C. § 230; Carafano v. Lycos, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003).

The CDA does not, however, protect from liability internet service providers which ***create, develop or transform*** wrongful content posted on a website. See Carafano, 339 F.3d at 1125; Hy Cite Corp. v. Badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148 (D. Ariz. 2005). "At some point, active involvement in the creation of a defamatory Internet posting would expose a defendant to liability as an original source." Barrett v. Rosenthal, 146 P.3d 510, 527 n.19 (Cal. 2006).

Two other district courts have denied similar Rule 12(b)(6) motions, finding that Defendants have created, developed and/or transformed defamatory content targeting EASI. See Hy Cite Corp., 418 F. Supp. 2d 1142 at 1149; MCW, Inc., 2004 U.S. Dist LEXIS 6678, at *31.

Xcentric's protestations to the contrary are unavailing. First, if the Court proceeds under the first method of adjudicating a Rule 12(b)(2) motion – as Xcentric essentially requests – Xcentric's denials cannot be considered or weighed. Kelly, 231 F.R.D. at 509. Next, Xcentric simply does not challenge many of the Amended Complaint's assertions, instead focusing on a blanket denial that Xcentric does not write posts about EASI.

Indeed, Defendants create, develop and transform original content targeting EASI on the website in three general ways. First, Defendants have actively encouraged and instructed at least one individual to post specific information denouncing EASI. In response to an email highly critical of EASI forwarded to Magedson, Magedson literally asked the individual to post the email in order to "p**s off" EASI:

> This is great…
>
> Can you post something or part of the e-mail below? This would be great, and it would definitely p[**]s them off!

(Emails between Ed Magedson and Jeff LeJune attached as Exhibit A (ellipsis in original).)

This type of active encouragement crosses the line from passive to active content providing, as one court has held:

> The defendants cannot disclaim responsibility for disparaging material that they actively solicit . . . The defendants are clearly doing more than making minor alterations to a consumer's message. They are participating in the process of developing information. Therefore, the defendants have not only incurred responsibility for the information developed and created by consumers, but have also gone beyond the publisher's role and developed some of the defamatory information posted on the websites.

MCW, Inc., 2004 U.S. Dist LEXIS 6678, at **33-35.

Second, Defendants create and develop content through various listings, headings and editorial messages on the website. Defendants list EASI as a "corrupt compan[y]" and a "con artist[]" (Doc. No. 19 at 2-3); see also MCW, Inc., 2004 U.S. Dist. LEXIS 6678, at *32 n.10 (citing Defendants' authorship of these headings as a factor in denying CDA immunity).

Defendants further list EASI on the website's "Top Rip-Off Links" featured on the website's homepage. (Home Page.) In fact, each entry concerning EASI on the website resides below the conspicuous heading "**Don't let them get away with it. Make sure they make the Rip-off Report!**" (Doc. No. 19 at 2.) Defendants add credence by suggesting that the website is more reliable than the Better Business Bureau, Attorney Generals and other agencies. (Home Page.)

Upon information and belief, Defendants have created or developed headings, titles or editorial messages targeting EASI. Titles and headings on the website include that EASI's dealerships are a "complete" and "long running" "scam," that EASI's Chief Executive Officer and other employees are "crooked" and "crooks," and that EASI has engaged in "fraud."

Although Magedson denies authoring or modifying any of the titles to the reports regarding EASI (Magedson Decl. ¶ 14), it is clear that the Defendants have done so in other instances. See MCW, Inc., 2004 U.S. Dist. LEXIS 6678, at **32-33 (noting that defendants do not dispute that they write disparaging messages about a particular company); see also Lohr McKinstry, Operator Defends Critical Internet Site, Press Republican (Plattsburgh, NY), April 17, 2001, available at http://www.pressrepublican.com (last visited Jan. 2, 2006) (stating that "Edward 'Madgeson' [sic] says he's responsible for some but not all the comments posted on badbusinessbureau.com . . . criticizing . . . . a host of . . . public officials.") (copy attached). Moreover, under the first method of review Xcentric has in effect elected, the court will not consider or weigh the controverting assertions of the defendant. Kelly, 231 F.R.D. at 509 (emphasis added).

Third, Defendants represent that they offer the prospect of compensation for their reports. (Rip-off Report.com, Rip-off Report Reporters, at http://www.ripoffreport.com/reporter.asp (last visited April 5, 2007).) One court cited this factor in denying Defendants' CDA immunity defense. Hy Cite Corp., 418 F. Supp. 2d at 1149.

3. Even if the Court holds that the CDA immunizes Defendants' conduct, not all of EASI's claims are subject to CDA immunization.

By its terms, the CDA only protects an internet service provider from liability based on a third party's independent statement; the statute does not immunize every illegal act of an internet service provider. See Chicago Lawyers' Comm. for Civ. Rights v. Craigslist, Inc., 461 F. Supp. 2d 681, 693 (N.D. Ill. 2006) ("Section 230(c)(1) does not bar 'any cause of action' . . . but instead is more limited -- it bars those causes of action that would require treating [a defendant] as a publisher of third-party content."). Accordingly, only EASI's claim for defamation would be subject to an adverse ruling on CDA immunity.

D. If the Court Grants Xcentric's Motion, the Proper Remedy Is Transfer, Not Dismissal.

The proper remedy for an adverse ruling on Xcentric's motion is transfer, not dismissal. See Moore, supra, at § 12.32[8]; State Indus. v. Beckett Gas, Inc., 200 F.R.D. 392, 398-99 (M.D. Tenn. Apr. 6, 2001) (Trauger, J.).

V. CONCLUSION

For the foregoing reasons, this Court should deny Xcentric's motion to dismiss for lack of personal jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing document was made via electronic mail using the Electronic Filing System upon the following:

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